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Supreme Court of the United States

OCTOBER TERM, 2000

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

—v.—

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ADVANCE PUBLICATIONS, INC., BELO CORP., BUENA VISTA MAGAZINES, INC., THE COPLEY PRESS, INC., COX NEWSPAPERS, INC., DONREY MEDIA GROUP, DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, FREEDOM COMMUNICATIONS, INC., GANNETT CO., INC., HACHETTE FILIPACCHI MAGAZINES, INC., THE HEARST CORPORATION, JOURNAL COMMUNICATIONS INC., KNIGHT RIDDER, MACROMEDIA INC., MAGAZINE PUBLISHERS OF AMERICA, INC., THE MCCLATCHY COMPANY, NEWS AMERICA INC., NEWSPAPER ASSOCIATION OF AMERICA, PHILADELPHIA NEWSPAPERS, INC., PRIMEDIA INC., VILLAGE VOICE MEDIA, INC., THE WASHINGTON POST COMPANY, AND ZIFF DAVIS MEDIA INC., *AMICI CURIAE,* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Do newspapers and magazines have the presumptive right under 17 U.S.C. § 201(c) to publish their collective works not only in print but also in digital and other non-print formats such as NEXIS and CD-ROMs that serve overwhelmingly important archival functions for researchers, students, historians and the public at large, or does such electronic publication infringe the copyrights of contributing freelance authors?

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INTEREST OF THE *AMICI CURIAE*[1]

This brief *amici curiae* in support of reversal is submitted on consent by Advance Publications, Inc., Belo Corp., Buena Vista Magazines, Inc., The Copley Press, Inc., Cox Newspapers, Inc., Donrey Media Group, Dow Jones & Company, Inc., The E.W. Scripps Company, Freedom Communications, Inc., Gannett Co., Inc., Hachette Filipacchi Magazines, Inc., The Hearst Corporation, Journal Communications Inc., Knight Ridder, Macromedia Inc., Magazine Publishers of America, Inc., The McClatchy Company, News America Inc., Newspaper Association of America, Philadelphia Newspapers, Inc., PRIMEDIA Inc., Village Voice Media, Inc., The Washington Post Company, and Ziff Davis Media Inc. (the "*amici*"). For the reasons discussed below, *amici* urge that the Court reverse the judgment below.

Amici are newspaper and magazine publishers who, collectively, publish hundreds of newspapers and magazines, including some of the most influential and useful periodicals in the nation, and trade associations that represent the interests of these newspapers and magazines. Almost all of those newspapers and magazines are collective works, containing contributions from freelance contributors in addition to contributions from staff-employee writers. Almost all have for some years (and in many cases some decades) been published in both paper and also non-paper, usually digital, formats, including the NEXIS service or other such services, CD-ROMs, microfilm or electronic media. For those media, today's issue and back issues of a publication are often electronically searchable with back issues of that same publication, and sometimes with back issues of other publications. Until this 1999 decision, publishers and apparently

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[1] No counsel for a party in this Court authored this *amici curiae brief* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of the brief. The individual *amici* are identified in the addendum attached hereto.

authors— consistent with industry custom — assumed that the 1976 Copyright Act granted publishers the right to exploit the collective work, including by licensing NEXIS and comparable electronic libraries to publish the collective work. Since few if any newspaper or magazine publishers have throughout this approximately two decades of electronic publication routinely obtained from each of their freelance contributors "an express transfer of the copyright or of any [electronic (or non-paper) publication or archival republication] rights under it," the continued preservation and integrity of electronic archives online or through such media as CD-ROM depends in large measure on the construction of 17 U.S.C. § 201(c) reached by this Court.

Acting, as the framers of the First Amendment expected they would, as representatives of the public interest and stewards of the public's interest in access to the record of the nation's history that the press writes day by day, *amici* have a direct and compelling interest in the privilege Congress afforded them under § 201(c) to publish their periodicals in any medium, including in digital formats and in such other media as microfilm and CD-ROM, for the benefit of researchers, scholars and the public at large.

SUMMARY OF ARGUMENT

Amici submit this brief to focus the Court's attention on the enormous extent to which the result reached by the Second Circuit would restrict public access to the national historical record compiled by the nation's newspapers and magazines since January 1, 1978. Unless reversed, the Second Circuit's decision will gratuitously harm the public interest underlying copyright law — without any discernible benefit to the public interest underlying copyright law, or even to freelance writers in general.

Over the past forty years — with republication first on microfilm and microfiche, and then in digital form with the advent of services like NEXIS and media like CD-ROMs, and more recently on websites of individual newspapers and

magazines — back issues of newspapers and magazines have become easier to access, easier to use, and free from physical deterioration. In reliance on these new archival media, public and university libraries have substantially reduced their holdings in physical copies of newspapers and periodicals.

The Second Circuit's decision threatens to degrade this valuable public resource immediately and severely. The boundless breadth of the decision appears, astonishingly, to mean that storage of any given issue from any given periodical with issues of other periodicals, or even with other issues of that same periodical — in an electronic library like NEXIS, or on a CD-ROM — precludes a publisher from relying on 17 U.S.C. § 201(c) with respect to every individual article in which the publisher does not own a separate copyright, or have the express, specific right to include it in the particular media format of the publication. The decision even seems to threaten the microfilm and microfiche archives on which the public had come to depend (and about which freelancers had not complained) before the advent of electronic media.

As a practical matter, the Second Circuit's decision will, at a minimum, lead most publishers to delete freelance contributions — assuming that such contributions can be identified — from the electronic versions of their old newspapers and magazines on a wholesale basis, due to the difficulty and expense of locating freelance contributors and obtaining their authorization for republication in those forms. Indeed, some publishers have begun making such deletions. The modest phrase "freelance contributions," moreover, covers a large territory: for newspapers, for example, it extends past such traditional "freelance" works as travel pieces and book reviews to news stories sent in by stringers, letters to the editor, Op-ed pieces and other articles sent in "over the transom" by political officials and public spirited citizens, among others. All of these, under the Second Circuit's decision, would (absent other available defenses) have to be deleted from all non-print versions of a newspaper to avoid infringement liability.

Whether the electronic publication occurred on NEXIS, on some other service, on a website, or in some other medium (such as optical disk or microfilm), the Second Circuit's judgment has the same consequence: it will be virtually impossible as a practical matter, and grossly inefficient, for publishers to find each and every freelance writer (or their heirs and assigns) whose work is included in an archived edition (usually without the benefit of any delineation of who was an "employee" and whose work would therefore be work-for-hire) and to negotiate over whether and on what terms to license the retention of that contribution as an integral part of the collective work that has been archivally republished in its original or revised form.

Most publishers' continued ability to make their collective works accessible electronically with any kind of completeness and integrity depends, therefore, on the result of this case in this Court. If the Second Circuit's decision stands, existing comprehensive archives will fall, and historians, researchers, scholars, journalists and society at large will no longer have meaningful access to the rough draft of the nation's history contained in back issues of the nation's newspapers and magazines. A generation of journalists, students and researchers will have to re-learn the old method of traveling to a brick- and-mortar library, if they are lucky enough to live near one that still retains paper archives of the magazines and newspapers they want to review.

ARGUMENT

THE SECOND CIRCUIT'S DECISION THAT AN ELECTRONIC OR ARCHIVAL VERSION OF A NEWSPAPER OR MAGAZINE IS NOT THE WORK ITSELF OR A REVISION OF IT WILL GRIEVOUSLY AND GRATUITOUSLY HARM THE PUBLIC INTEREST

A. The Second Circuit's Decision Necessarily Will Force Newspaper and Magazine Publishers To Remove Articles by Freelancers from Electronic Archives and Degrade an Important Public Resource.

1. Newspapers and magazines are written for today, but are also valuable for tomorrow. The economic cost of producing a newspaper like The Washington Post is borne by its subscribers and advertisers on any given day; but it has a continuing importance to the historians and researchers and students who examine it five days, five years, or fifty years from its publication date. That is generally true of the works of *amici* and other periodical publishers; they write for today, but their daily, weekly or monthly editions are used in different ways by the public for years after first publication. The maintenance, completeness, integrity, and accessibility of the archive of the nation's publications is a valuable public asset.

For many years, access to the archived publications of the American press, broadly defined, depended on the work of libraries, the willingness of publications to maintain "morgues" open to the public, and the ability of users to physically travel to and use those libraries and morgues. With the advent of new technologies making libraries of publications available in paperless ways that facilitate availability, access, storage, indexing, and use — the NEXIS service available through the Internet or by dial-up or cable modems, and media such as CD-ROMs, microfilm, and microfiche — the physical library has been replaced by the electronic archive, and old issues are as a result far easier to access and to use. The historian, student, or journalist who wants to see The New York Times's coverage of the Gulf War, or the researcher wanting to use Time Magazine to assess the Reagan Presidency, or the social scientist wanting to review newspapers in Iowa to examine how

communities in the upper Midwest reacted to the outflow of the young to the coasts in the '80s and '90s, no longer need travel to New York or Des Moines. They can access the NEXIS service or its competitors, or obtain a set of CD-ROMs, and work quickly, conveniently, and efficiently. The search engines that allow users to locate individual articles within these electronic copies are simply automated and more efficient versions of the Readers' Guide to Periodicals.

2. The Second Circuit's acceptance of respondents' overly restrictive reading of section 201(c) of the Copyright Act of 1976 undermines this important function and consigns the public to paper copies of publications as the only definitive archive. That result — in an age when collection and maintenance of paper archives is increasingly uncommon, when electronic storage and archiving have become standard, and in the face of the Congressional decision in 1976 to make the copyright law media-neutral — is to the practical advantage of no one, and would greatly harm the public interest. Copyright law has always protected publishers who preserved and distributed paper-printed versions of their newspapers and magazines from claims of copyright infringement by freelance contributors (who are, by custom, typically compensated once, at the time of their initial contribution, for a nonexclusive license that leaves them free to exploit their works in other ways). The Second Circuit, however, would deprive most publishers of that same protection to the extent that they choose to rely on electronic copies.

According to the Second Circuit, publishers of newspapers and magazines risk infringement liability if they publish or republish their works (containing freelance contributions) through NEXIS or comparable means, unless they either withdraw freelance articles before delivering their copy to NEXIS or comparable services, or expressly acquire republication rights. This would be so even though *amici* and, the record shows, defendants, had for many years published in those additional media without complaint.

Under the decision below, for example, electronic publication of law reviews, which typically include student notes (for which written licenses expressly covering electronic rights were unlikely to have been obtained), is not privileged under § 201(c), and publishers who want to avoid liability, and the NEXIS service, must either purge from the published editions on NEXIS all contributions of non-employees (*i.e.*, usually the complete text of law reviews), or find and obtain consents from all past authors of student notes or of any other articles and comments for which they did not obtain express transfers. And just as pieces written by authors who cannot be located will likely be withdrawn from electronic archives, so too CD-ROMs containing back issues will likely be destroyed.

Among the freelance contributions that may have to be purged from the electronic newspaper and magazine archives on which historians, researchers, and students depend will be some of the most important markers of public opinion and sentiment, namely op-ed pieces (other than those written by employee columnists) and letters to the editor. Historians looking back to examine the range of opinion on important public issues — at least prior to the late 1990's, when the Second Circuit's startling reversal of the district court's dismissal of this suit led some publishers to begin to take pains to acquire express rights that they had always understood they already possessed — would have to travel to those cities to find it in archived paper copies; the electronic archives which they have for many years used will no longer dependably be able to retain those parts of their publications on the archives available on NEXIS and its competitors, or on their websites.

Practical reality make it difficult, if not impossible, to go back and obtain authorization from freelance writers for their individual contributions to newspapers and magazines now stored in electronic libraries. Compensation was paid when the pieces were published, and most newspapers and magazines have had no need to retain, much less to update, records of the whereabouts of their freelance contributors. Even if records were available (which they generally are not), the chance that

writers of prior decades remain at the same address is small. The impracticality of locating all freelance contributors, much less negotiating appropriate licenses, is further complicated by the possibility that fractional interests in the copyrights have vested in the authors' heirs and assigns, or been assigned to third parties.

Nor is there any practicable way to negotiate the "appropriate" share of the revenue for the Jane Doe who in 1990 wrote a piece for the travel section of The Los Angeles Times or the Bergen Record. Her article has consistently been available on NEXIS, but because NEXIS has not compiled data on whether particular articles have been downloaded or printed since their electronic publication, no one knows how many times it has been accessed, and no one knows, or can know whether any access resulted from a search to see what those newspapers had published on that day or topic (indicating that the value is attributable to the publisher, not to the freelance contributor) or from a search for Doe's work (suggesting that the economic value is attributable to Doe's own work). If Jane Doe could be found, and if she insisted on payment, it would be impossible reasonably to assess the value to her of the right to retain her work in the copy of that issue in the archive.

Because the Second Circuit predicated direct infringement liability on merely the delivery of the text of a newspaper or magazine to NEXIS (or the republication of a back issue on an optical disk or other storage medium), and seemingly on the continuing *availability* of the text of back issues regardless of whether the freelance writer's work was subsequently requested, accessed, or read by anyone at all, the liabilities faced by the publishers and the electronic libraries could potentially be enormous, and far outweigh the economic value to the publication of retaining any particular freelance article in the archive. The result would likely be decisions by publishers to purge from electronic libraries all articles not written by readily identifiable staff writers, rather than increased compensation to freelance writers for the right to retain previously written works — and an over-broad purging at that, with doubts resolved

against retaining articles of uncertain parentage (was Doe an employee or freelancer in 1981?). The district court record showed that most of the revenue publications obtained from NEXIS result from search fees, associated with a user's search of a file containing a publication's back issues. When withdrawing freelance articles from the file would not likely affect those revenues, while retaining them threatens substantial liability, it is not hard to predict that deletions will follow.

Given these circumstances, the impact of the Second Circuit's decision is lose-lose-lose:

- *Publishers* lose by having to allocate scarce resources to identifying and stripping freelance materials from existing electronic copies and libraries, and lose through the diminution of the public benefit they have been making generally available.
- *Freelancers* lose, since those who would have chosen to have their works remain online without further compensation will nonetheless have their works eliminated from electronic copies and libraries, depriving them of intangible benefits of continued electronic publication and the "free publicity" and boost to personal reputation it offers. That the vast majority of freelancers might prefer continued inclusion in electronic libraries, or on CD-ROM, etc., is of no moment: their works will still be purged, because transaction costs will prohibit most if not all publishers from pursuing the impractical task of finding and striking bargains with freelancers over contributions dating back decades, for which there is no measurable economic value.
- Most importantly, *the public* will lose its convenient access to and attendant ability to search through comprehensive and genuine archived newspapers and magazines.

Moreover, the decision below would likely make matters *worse* than they were before the advent of electronic media.

During the past few decades, as a result of the availability of services like NEXIS, and new storage media like CD-ROMs, many libraries have cleared their shelves of their paper-printed archives of periodicals and reduced their ongoing archival efforts. Storage costs and the fragility of newsprint have spurred increasing reliance on electronic archives, whose accessibility and permanence have been enormously beneficial. The Second Circuit opinion therefore threatens not only the integrity of the historical record, but as a matter of practical fact the accessibility to the historical record too.

The increasing accessibility of back issues in new media has undeniably advanced copyright's goal of "promoting broad public availability" of copyrighted work. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Historians, researchers of various types, students, and curious citizens are able as never before to access back issues, not just of their own home town papers, but of a wide range of newspapers and magazines throughout the nation. The Second Circuit's decision would destroy that achievement, and turn a comprehensive, accurate, national archive into a collection riddled with holes. Publishers who do strive for completeness and a faithful electronic record, despite all these obstacles, could be exposed to any holdout's whims, giving individual freelancers bargaining power out of all proportion to any real value in any individual work that may have no real public demand at all. The resulting "hole in history" would have a devastating impact on research and study.

If, as the Second Circuit has held, delivery of copies of newspapers and magazines containing freelance contributions to NEXIS (or to other services or archival media) infringes the rights of freelance contributors, then existing archives will likely be perforated, because the contributors cannot as a practical or economic matter be located, and because the risk from not deleting conceivably "infringing" articles far exceeds any economic benefits to publishers of retention. The value of existing complete electronic archives will be sacrificed to the Second Circuit's misreading of § 201(c).

B. The Second Circuit's Decision Has Already Begun To Force Publishers To Remove and Exclude Articles from Electronic Libraries.

The harm that the Second Circuit's cramped reading of § 201(c) will cause to existing and future electronic libraries is evident not only from logic and common sense prediction, although those bases would suffice. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991) (prediction that law would deter the writing and publication of certain works); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (prediction that content owners would refuse to license parodic uses). The Second Circuit's decision has *already* caused substantial harm.

Some newspaper and magazine publishers — including The Washington Post — have already responded by removing readily identifiable freelance articles from NEXIS and their electronic archives. Other leading papers and magazines have begun the complex measures necessary to enable the prompt deletion of such articles if this Court affirms.[2]

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[2] Most publications have no easy way to separate freelance contributions from those of staff writers, as the contributions do not have any word or phrase (such as "freelance") that can be easily searched. For them, identification and deletion of freelance contributions would be a time-consuming and expensive matter, requiring, for example, creation of lists of employees and dates of employment from personnel records, and cross-checking all bylines and publication or creation dates against those lists. Because names change and many journalists use different name variants (A. M. Rosenthal is also Abraham M. Rosenthal), much of the necessary work could not be automated. Moreover, the back issues facing purges of freelance articles are not only all those published within three years of commencement of *Tasini* in 1993, but all those published under the Copyright Act of 1976 (effective January 1, 1978), because

(continued...)

The wholesale deletion of freelance articles both eliminates a portion of the past "first draft of history" from the archives most people will rely on, and renders what remains far less useful, because its integrity and therefore reliability is undermined. Persons looking in the NEXIS file for some newspaper or magazine for articles from particular dates, or on particular subjects, would no longer have the opportunity to conduct searches whose results are dependable or accurate: the results of *every search* become questionable, as the results *may* — or may not — provide a true picture of what the publication really covered on that date. Like photographs from the Soviet Union, the results of searches from a purged electronic library are no longer entirely trustworthy or informative: the absence of an article (like the absence of a face from the annual Politburo photograph) may, or may not, be telling.

Some publishers have deleted but on a partial basis. After the electronic service licensees, having been sued in three class actions that followed in the wake of *Tasini*, gave notice of the suits to the content providers who provided the articles in suit, for example, many content providers prophylactically insisted that the electronic services delete *all* articles written by the plaintiffs, not only those identified in the Complaints, so as to avoid any later charges of willful infringement. An alternative approach, but one also likely to result in degraded and incomplete electronic archives, has been taken by the NewsLibrary electronic service, which offered even before the class actions were filed to delete articles on request:

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[2](...continued)
plaintiffs' counsel in *Tasini* and the putative class actions recently filed have asserted a "continuing infringement" theory under which the mere availability of an article on a we site or electronic service (whether or not accessed) is infringing. The plaintiffs in the post-*Tasini* class actions expressly seek to represent all freelance authors creating articles for newspapers and magazines since January 1, 1978. *See* Section E, *infra*.

> We believe that we have the necessary rights to digitize those editions of the newspapers that we have made available online. If you were a freelance writer, rather than a staff reporter or creator of a work made "for hire," and believe that you did not license or otherwise grant all rights to the applicable newspaper in which your article was published, and would like us to remove your work so that third parties cannot read, print, or download it, please notify us . . . .[3]

The immediate harm caused by the Second Circuit's decision is not limited to the disappearance of published articles from electronic libraries; it extends as well to chilling projects aimed at making such data more extensively and accurately available. Many publishers have been examining and beginning to implement plans for expanded digital archives, which would move beyond text to include the kind of reproduction now available only on paper, microfilm, or microfiche. The transition from microfilm to indexed digital formats would be a boon to researchers, enabling them to see replicated images of the original publications and also to search entire archives in minutes using Boolean searches, rather than having to troll through indices, spool through microfilm, and skim articles to find relevant information. The articles located in such searches would be accessible in visual formats that, like the photographic copies presently used in microfilm, replicate the column format, typeface, and other visual incidents of the original publication. Reproduction on this model would preserve virtually all of the features of the original editorial selection and arrangement that first made the newspapers eligible for copyright as collective works.

The Second Circuit's rule seems so sweeping, however, that the mere availability of multiple back issues in a single file

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[3] <www.newslibrary.com/region_pgs/freelance_notice.htm>.

or on a single CD-ROM, searchable in a single convenient search, would be argued to expose the publisher to liability for copyright infringement, regardless of how faithfully the online publication replicates the selection, arrangement, and even the superficial aspects of the presentation of the original issues. Accordingly, if publishers cannot rely on § 201(c), publishers who wish to digitize their archives will have to take a hard second look and may not be able to proceed, because the cost and difficulty of identifying past freelance contributors and purging their contributions, and the potential cost of suits brought by such authors, may make digitization impracticable.

C. Online Publication Is Part of First Publication, and a Decision Treating Only Paper Publication as First Publication Is Unfaithful to the Copyright Act of 1976.

A further error infecting the Second Circuit's approach is its archaic premise — contrary to the fundamental rule that copyright protects expression, regardless of the "medium of expression," and to Congress's strenuous effort to make copyright law enacted in 1976 medium-neutral — that the "collective work" to which § 201(c) refers is solely the paper version of a newspaper or magazine, with electronic publication protected, if at all, only as a "revision" or "subsequent" work under § 201(c). That error is of particular concern to *amici*, as it misstates the realities of even current publication practice (and surely practices to come). Correcting that erroneous premise would ineluctably result in reversal of the judgment below. It is vital to realization of Congress's vision to recognize that the newspapers and magazines published by *amici* and their competitors are already being published *simultaneously* in multiple media, paper and electronic — and thereby published well within the protection Congress afforded to the publisher of a collective work for publication of "that particular collective work" itself.

The courts below may have been led astray by evidence that, as of some time in the mid-1990's, Sports Illustrated was released to NEXIS "some 45 days later" than the print publication. *Tasini v. New York Times Co.*, 972 F. Supp. 804,

812 (S.D.N.Y. 1997), *rev'd*, 206 F.3d 161 (2d Cir. 1999). Whatever the record may have shown about Sports Illustrated's electronic publication then, however, the reality for most newspapers and magazines today is that electronic publication — on NEXIS or its competitors, or even on the periodical's website — usually occurs on the same day as print publication. This is the case, for example, with The New York Times and hundreds of other newspapers, which on the day of first paper publication are also available online, on NEXIS and other platforms as well.

The decision below treats electronic editions, even if initially published on the same day as the paper editions, as neither "that particular collective work" nor a "revision of that collective work," and apparently considers the inclusion of freelance contributions from the paper edition of the collective work together with staff work to be infringing if the electronic edition is available in an electronic library or together with back issues or with issues of other publications. *See Tasini*, 206 F.3d at 167-69. The Second Circuit drew that deeply flawed conclusion from the fact that the electronic editions published on NEXIS (or other electronic services), even if published simultaneously with paper issues, share various disabling characteristics that it believed independently disentitle publishers from relying on § 201(c): the electronic editions are not identical to the paper edition, and they are searchable together with other periodicals and back issues of the same periodical.

Given Congress's focused effort to render the copyright law medium-neutral, *see* 972 F. Supp. at 818, and the fact that protection is afforded for expression, regardless of the medium in which it is embodied, it is hard to understand the panel's reasoning. Why should a newspaper's acquisition from a freelance author of the right to publish an article in its May 1 edition not extend to both the paper and electronic editions, absent some express agreement otherwise? Today's New York Times is today's New York Times regardless of whether it is the early edition, the late edition, or an electronic edition. A reader who asks her colleagues at lunch "Hey, did you read that

editorial in The Miami Herald about the election today," is communicating quite effectively about a particular article in a particular publication, and it matters not a whit to her accuracy, to her colleagues, or to copyright law whether she was reading on newsprint or a computer screen.

The Second Circuit's decision superimposes on this reality an outmoded legal fiction — the artificial sequence of "first publication" and "electronic republication." Nothing in the legislative history of copyright revision and the carefully constructed compromises which underlie it, including in particular the compromise that underlies § 201(c), suggests that Congress intended the Copyright Act to be construed in a way so divorced from practices in the copyright industries. (To the contrary, the influential final House Report emphasizes the publishers' right to "republish" the collective work, and even to republish a freelance contribution in a "revision" of that collective work published ten years later. H.R. Rep. No. 94-1476, at 122 (94th Cong., 2d Sess., 1976).) And nothing in the text of the Copyright Act, including its definition of "collective works" and its provision of copyright protection to "expression" rather than to material objects, supports restricting the § 201(c) privilege to paper publication or rendering it inapplicable to the same collective works that are published electronically, even if somewhat abridged.

D. Electronic Services Are Created and Used as Complete Electronic Libraries.

Refusing to view NEXIS as an electronic library and insisting on viewing it from the point of view of end-users rather than publishers, the decision below is particularly insupportable because it ignored the key facts that render the library analogy appropriate. The compromise that underlies § 201(c), separating what publishers of collective works may do from what they need further authorization to do, afforded them a broad right to exploit their collective works (short of either

cherry-picking or revising particular freelance selections).[4] It was therefore error to ignore what the publishers actually do with the collective works and to look, instead, at what end-users do.

The licenses publishers enter into with electronic libraries like NEXIS are not comparable to those that Congress said would be beyond the rights afforded by § 201(c), namely licenses for new anthologies of disaggregated articles (*e.g.*, such new anthologies as "Best Newspaper Articles of 1999" or "50 Best Recipes from the Los Angeles Time Home Section"). Under their agreements with the electronic services, publishers license their collective works, not individual articles piecemeal; they transmit those collective works (slightly abridged), issue by issue, day by day; and the electronic libraries thereupon upload the collective work, issue by issue, to the electronic archives. The electronic libraries store and index those collective works. The publishers and the electronic libraries to whom they entrust their collective works should not be menaced with damages (potentially up to $150,000 per article) based on a premise — that the publishers license disaggregated articles, rather than the collective works to which § 201(c) applies — that has no basis in fact.

Electronic services pay periodical publishers for the use and availability of their collected periodicals. They are uninterested in acquiring selected articles — to the contrary, they

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[4] As the Court noted in *Stewart v. Abend,* 495 U.S. 207, 225 (1990), "each provision of 1976 Act was drafted through series of compromises between interested parties," and courts properly should enforce those compromises as reached, rather than try to look through them for overarching "principles." We agree with the petitioners' reading of the legislative history as fully supporting what the statutory language affords, a broad privilege for publishers to exploit their collective works by reproducing or distributing the collective work and "*any* revision" of it.

market the availability of the full text of leading newspapers and magazines — and do not adjust their arrangements depending on whether a newspaper's content, on any given day or even in any given year, contains some "more valuable" article. Hollywood licenses individual articles (the film *Saturday Night Fever,* for example, was famously based on an article in New York Magazine), and freelancers typically have reserved those rights for such further exploitation. Electronic libraries, by contrast, acquire collective works as a whole, not the skimmed cream that might be particularly lucrative. Just as payments for a newspaper on microfilm are for the collective work as a whole, payments reflect the presence of a publication in the library — for example, a search in The Atlanta Journal-Constitution file — not the reader's choice to study one article within the publication rather than another.

In a brick-and-mortar library, patrons pay (through taxes, entrance or membership fees or tuition) for the privilege of entering, perusing the contents, and possibly borrowing — not for the right to own or even to access specific volumes, as they do in a bookstore. A library could charge its patrons a fee for entering one room, or a different fee for entering multiple rooms. Electronic services like NEXIS are libraries that charge their readers on this basis. In NEXIS, for example, there is a New York Times file that one can search for a fee; another file for the Washington Post, searchable for another fee; and other files that aggregate the individual papers and are priced accordingly. The fees paid by users generally depend on usage of a file, and do not distinguish, for example, an op-ed piece by staff columnist William Safire or an article by staff writer Linda Greenhouse, on the one hand, from a stringer's 200 word report on a college football game, on the other.

The electronic services, in turn, pay a percentage of the entrance fees collected from patrons to the publishers who provide their periodicals to the electronic library. In the NEXIS system described to the district court, for example, these payments are not tied to the uses that the public makes of the individual works that constitute each file; fees were set for

searching a given file, and, if anything was printed or downloaded, for the fact that some article (it did not matter which) from some given newspaper or magazine was printed or downloaded.

Similarly, as to CD-ROMs, payment is based not on use of individual works — indeed, there would be no possible way to gather that information. Rather, publishers receive a portion of the gross revenue from the CD-ROM library disks licensed to subscribers at prices which reflect the value of the aggregated collective works.

In short, publishers are engaged in the conduct that Congress said was within the protection afforded them by § 201(c) — making use of their collective works — and *not* in the revision of freelance contributions and cherry-picking (licensing of individual works in contexts divorced from the collective work) that Congress agreed would remain outside that protection. There are, undoubtedly, reproductions and distributions that publishers of collective works *could* make of individual contributions that would lie outside the privilege afforded by § 201(c), but licensing electronic publication of the collective work as a whole (or in a shortened — *i.e.*, revised — version) is not one of them.

E. Neither the Second Circuit's Nor the National Writers Union's Proposed "Solutions" Would Avert Wholesale Deletions from Electronic Libraries.

The Second Circuit justified its holding in part by stating that publishers and freelance authors "are free to contract around the statutory framework." *Tasini*, 206 F.3d at 170. That solution would do nothing to rescue existing electronic archives; as noted above, publishers often lack the necessary information to even locate their past freelance contributors (particularly for contributions between 1978 and 1993), the value of old freelance contributions is difficult to measure, and the transaction costs of reaching new agreements for maintaining old work in archives would swamp any economic benefit in doing so.

The "Publications Rights Clearinghouse" ("PRC") created by the National Writers Union would be no more effective in avoiding wholesale degradation of existing archives. Most importantly, only a tiny fraction of authors have joined the National Writers Union and/or engaged the PRC as their agent, so that a publisher's cooperation with it affords wholly insufficient protection to justify *not* removing the freelance articles that economic prudence would dictate removing. (Indeed, Contentville.com, which agreed to participate in the NWU's PRC, has nonetheless been sued for enormous damages by The Author's Guild in one of the post-*Tasini* class actions.) Absent a legislative solution, no voluntary clearinghouse can provide sufficient protection to preserve existing archives.

Given its substantial under-inclusiveness, it is fair to view payments under the NWU's scheme as protection payments (participate and our attorneys won't sue you), not the kind of rational license structure that would give a publisher sufficient confidence to forego wholesale deletion of (arguably) freelance articles from existing archives if the Second Circuit's judgment were to be affirmed.

Nor do the three lawsuits recently brought by various writers, seeking to represent classes of all freelance writers, afford a basis for averting destruction of existing archives (or a rational mechanism for allocating royalties to freelance writers on an ongoing basis, a problem that would properly be addressed by a legislative solution, not a judicial one).[5] If

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[5] *Laney v. Dow Jones & Company, Inc.*, 00 Civ. 769 (D. Del.); *The Authors Guild, Inc. v. The Dialog Corp.*, 00 Civ. 6049 (S.D.N.Y.); and *Posner v. Gale Group, Inc.*, 00 Civ. 7376 (S.D.N.Y.). On December 6, 2000, the actions were transferred to New York City for coordinated pretrial proceedings by the Joint Panel on Multidistrict Litigation.

Each complaint alleges that the inclusion of plaintiffs' works on defendants' electronic services, through the inclusion

(continued...)

Tasini were affirmed, *amici* and other publishers will take steps to reduce liability immediately, including by deleting identifiable freelance articles from existing archives to the extent possible. It is hard to imagine that risk-reducing protection being foregone in the "hope" that a class would be certified and that a loss to the entire class allowing archive preservation at a tolerable cost would follow.

Because of the intractable problems of information and valuation addressed above, class action litigation in this setting (where total revenues received by publishers from electronic libraries makes plain that any realistic notion of economic damage for any given article would be pennies) will hasten the process of disassembling the nation's historical archive that began when the Second Circuit upset a 21-year old understanding of the meaning of § 201(c) of the 1976 Copyright Act. Class action litigation in the wake of the Second Circuit's removal of § 201(c) protection is highly unlikely to produce a rational way to pay freelance writers for the availability of their contributions in electronic libraries, even assuming that such

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[5](...continued)
of newspaper and magazine issues, constitutes willful infringement. Each seeks, in addition to injunctive relief, awards of statutory or actual damages regardless of whether any user has accessed any specific article by any of the countless purported class members, and despite the fact that the electronic libraries like NEXIS have obtained rights to those back issues only through contractual arrangements with reputable publishers who have represented and warranted that they have rights to their contents and that use by the electronic services would not violate the rights of any third parties. (And, of course, the publications in turn typically paid for what they and the authors understood to be nonexclusive licenses applicable to all media). These putative class actions show that the Second Circuit's decision threatens publishers and the electronic services through whom they electronically publish with potentially bottomless liability.

availability is infringing. It is certain, however, to generate hydraulic pressure to delete freelance contributions from electronic libraries.

CONCLUSION

Because the Second Circuit's decision threatens the vital public interest in access to the complete national historical record as reported by the nation's newspapers and magazines and made available through such services as NEXIS and such electronic media as CD-ROMs, and wholly misreads § 201(c) and the congressional judgment that underlies it, the judgment below should be reversed.

Respectfully submitted.

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